

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.

WASHINGTON, D. C. 20036

198572
WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

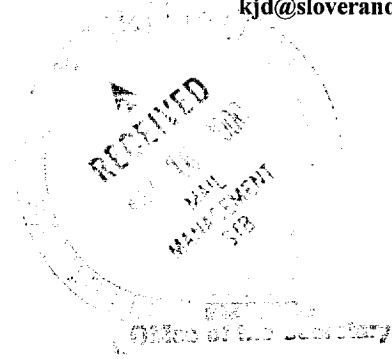
WRITER'S E-MAIL:

kjd@sloverandloftus.com

May 16, 2000

VIA HAND DELIVERY

The Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit
Attn: STB Ex Parte No. 582
1925 K Street, N.W.
Washington, D.C. 20423-0001



MAY 16 2000

Part of
Public Record

Re: Ex Parte No. 582 (Sub No. 1), Major Rail
Consolidation Procedures

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the original and 25 copies of the Comments of Consumers Energy Company. Also enclosed is a 3.5-inch diskette containing the text of this letter and the enclosed Comments in WordPerfect 8.0 format.

Please acknowledge receipt of the enclosed filing by stamping and returning to our messenger the enclosed duplicate of this letter.

Sincerely,

Kelvin J. Dowd

KJD/cbh
Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

In the Matter Of:

MAJOR RAIL CONSOLIDATION
PROCEDURES

Ex Parte No. 582
(Sub No. 1)

Office of the Secretary

MAY 16 2000

COMMENTS OF
CONSUMERS ENERGY COMPANY

Part of
Public Record

Consumers Energy Company ("Consumers") hereby submits its Comments in response to the Advance Notice of Proposed Rulemaking served by the Board in this proceeding on March 31, 2000 ("Notice").

IDENTITY AND INTEREST

Consumers is an electric and gas utility company serving all 68 counties of Michigan's Lower Peninsula. Consumers' electric utility operations serve a mix of approximately 1.6 million residential, commercial and industrial customers, with the largest being the automotive industry. Principal cities served include Battle Creek, Flint, Grand Rapids, Jackson, Kalamazoo, Midland, Muskegon and Saginaw.

The largest share of Consumers' electricity requirements is satisfied by five coal-fired generating plants: the J.H. Campbell Station near West Olive, MI; the D.E. Karn and

J.C. Weadock Stations near Essexville, MI; the B.C. Cobb Station at Muskegon; and the J.R. Whiting Station near Toledo, Ohio. Together, twelve generating units have a capacity of 2,870 megawatts and produce approximately 19.1 million megawatt hours of electricity each year, through the combustion of over 8.9 million tons of coal. These plants comprise over 78% of Consumers' baseload system capacity. Consumers' principal interest in this proceeding springs from the rail transportation circumstances that attend the Campbell and Whiting Stations, each of which is captive to a single carrier for coal deliveries, but presently can and does avail itself of competitive origin service via neutral interchanges. These "bottleneck" stations are particularly susceptible to the likely, adverse consequences of any further major rail consolidations undertaken under the auspices of the Board's current merger guidelines. Consumers therefore applauds the Board's decision to revise its guidelines to better fit today's concentrated railroad market, and respectfully submits these Comments for the agency's consideration.

COMMENTS

In its Notice, the Board properly acknowledged that the threat of a "rail duopoly" emerging from any new mergers or major consolidations warranted affirmative, remedial action on the part of the Board:

In today's environment -- with the industry far more concentrated than it was when our current regulations were fashioned; with the prospect that any further major rail merger would trigger strategic responses that could lead to a transcontinental rail duopoly; and with only limited opportunities remaining for significant merger-related efficiency gains -- the time has come for us to consider whether we should revise our rail merger policy, as many have suggested, with an eye towards affirmatively enhancing, rather than simply preserving, competition.

Notice at 4. Consumers agrees with the Board that the time has come for a policy shift away from merely looking to identify apparent reductions in direct competition resulting from a proposed merger, and toward an approach that would seek out opportunities to enhance or create new competitive options for shippers dependent on railroads for essential transportation service. Consumers also submits that a central part of that shift should be the adoption of new rules to address the problem of bottleneck line segments, in the context of mergers and major acquisition proceedings. Cf. Notice at 7-8.

Consumers' Campbell Station is captive to CSX Transportation Inc. for delivery of over 3.5 million tons of coal each year. For the share of Campbell's annual burn that is

comprised of Western coal, however, Consumers can obtain origin service from either the Burlington Northern and Santa Fe Railway (BNSF) or the Union Pacific Railroad (UP), each of which maintains interchanges with CSXT at Chicago. This origin competition has yielded benefits to Consumers and its ratepayers in the form of lower delivered fuel costs. Cf. Finance Docket No. 33388, CSX Corporation, Et Al. - Control and Operating Leases/Agreements - Conrail Inc. Et Al., Comments of Consumers Energy Company, October 21, 1997, V.S. Garrity at 7-8, 12-13. The Whiting Station is similarly situated: all coal deliveries are handled by units of the Canadian National Railway, but origin service via the Toledo interchange can be obtained from Norfolk Southern Railroad, CSXT, and -- for Western coal -- BNSF or UP. In either case, a merger or other consolidation between the destination monopolist and one of Consumers' origin competitors (such as the proposed BNSF-CN merger) likely would lead to a complete foreclosure of competition at the affected Station(s), as the destination carrier no longer would be expected voluntarily to offer non-discriminatory rates and delivery service in conjunction with all connecting roads.

In its Notice, the Board indicated a willingness to reconsider its presumption regarding application of the so-called "one lump" theory, and consider revising its merger rules to include enhanced "bottleneck" relief in cases such as those faced

by Consumers at the Campbell and Whiting Stations. Notice at 7-8. Consumers' own experience in securing rates and service arrangements for those Stations confirms the need to revisit the "one lump" rule, and Consumers endorses the adoption of a new rule respecting rail bottlenecks. However, the prototype outlined in the Notice -- "requiring merger applicants to offer, upon request, contracts for the competitive portion of joint-line routes"-- would not be an effective solution in practice. In prior proceedings before the Board, all the major rail carriers have made clear their opposition to any requirement that they establish separate rates for bottleneck segments, and have litigated against the "contract exception" to the Board's current Bottleneck Rules. See Notice at 8, n.17. Merely directing merger applicants to "offer...contracts for the competitive portion" before rates and delivery terms for the bottleneck segment were in place would not assure the shipper the benefits of actual competition, as there would be no guarantee that the rates and other terms reluctantly offered would reflect the market, and as a contract offer, the rates could be outside the scope of Board jurisdiction. See 49 U.S.C. Section 10709(c). For bottleneck relief to be effective, the competitive contract must follow the establishment of rates for the captive portion of the move, not the other way around.

Consumers proposes that the Board adopt a rule that conditions approval of any new major rail consolidation on each involved carrier's agreement either to grant unrestricted trackage rights over bottleneck segments to permit competitive service by an unaffiliated connecting carrier, or, where such pro-active relief would be impractical, to establish a common carrier rate between any two points on its system upon request by a shipper capable of tendering traffic under that rate. There should be no requirement that the shipper first arrange for transportation to or from the bottleneck segment, and the reasonableness of the established bottleneck rate (should it be challenged by the shipper) should be determined without regard to whether or on what terms the shipper has made such arrangements. The "Bottleneck Relief" rule proposed by the Western Coal Traffic League, Et Al. in their Joint Comments in this proceeding would meet these requirements.

CONCLUSION

For the reasons set forth above, Consumers urges the Board to revise its rail merger guidelines to afford meaningful and effective access to the Board's rate review and prescription authority to shippers dependent on rail service over "bottleneck" line segments, as a mandatory condition of approval of any new,

consolidations or other major transactions under 49 U.S.C.

Section 11323 involving the carrier(s) that control the segments.

Respectfully submitted,


CONSUMERS ENERGY COMPANY

A.T. Udrys
Assistant General Counsel
Consumers Energy Company
212 West Michigan Avenue
Jackson, MI 49201

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, NW
Washington, DC 20036

William L. Slover
Kelvin J. Dowd
SLOVER & LOFTUS
1224 Seventeenth Street, NW
Washington, DC 20036



Date: May 16, 2000

Attorneys & Practitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2000, I caused a copy of the foregoing Comments to be served on all persons designated as a Party of Record or Member of Congress in the Board's decisions in this proceeding served April 28 and May 10, 2000, by first-class United States Mail.



Kelvin J. Dowd